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ABSTRACT

Pursuant to Assembly Bill 803, Chapter 972, of the California Statutes of 1977, which prohibits unlawful discrimination in programs receiving state aid, this report outlines regulations for the investigation and adjudication of discrimination complaints within the California community colleges. The report first examines the responsibility of the Chancellor and Board of Governors, under the law, to investigate complaints, provide admininstrative hearings when there is probable cause that a violation has occurred, and curtail state funds to colleges that have been found guilty of unlawful discrimination. The controversial role of the Secretary of Health and Welfare in assisting state agencies in the preparation of regulations for the implementation of these regulations is then discussed, as are the estimated costs such regulations will impose on the colleges. The regulations themselves are then presented, grouped under four articles: (1) a statement of intent; (2) definitions of protected groups and prohibited activities; and (3) the primary role of the college district in informing the college community of the regulations and in adjudicating complaints; and (4) the responsibility of the Chancellor's Office in providing further investigations, if needed, and in enforcing decisions. Critical comments made by the Office of the Secretary of Health and Welfare are appended. (JP)

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Report prepared for a Meeting of the
Board of Governors
of the
California Community Colleges

San Mateo, California
December 4-5, 1980

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Board of Governors of the
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Item 5

Title: Nondiscrimination in Community College Programs Funded through the Chancellor or Board of Governors (Regulations to Implement Assembly Bill 803, Chapter 972 of 1977)

Staff Presentation: Catherine Close-Kaufman, Staff Counsel
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Affirmative Action Programs

Summary:

Assembly Bill 803, Chapter 972 of the Statutes of 1977, prohibits unlawful discrimination in programs receiving state assistance. The statute begins:

> "No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color or physical or mental disability, be unlawfully subjected to discrimination under any program or activity that is funded directly by the state or receives any financial assistance from the state."

The statute then continues to charge state agencies who administer state funded programs with enforcement of its provisions and requires them to adopt regulations to that end. The statute also requires the Secretary for Health and Welfare to establish guidelines for determining who is protected by the act and what practices are discriminatory. The Secretary filed regulations meeting this requirement in June 1980.

This item proposes regulations to implement Chapter 972 of the Statutes of 1977. The Secretary for Health and Welfare and the Department of Finance have submitted comments on these proposed regulations. This item discusses those comments.

At its November 14 meeting the Education Policy Committee voted to recommend this item to the full Board for approval.

Education Policy Committee Recommendation

It is recommended that the Board approve the proposed regulations, which would become operative on July 1, 1981.

Background

Assembly Bill 803, Chapter 972 of 1977, added the following to the California Government Code:

11135. Prohibited discrimination under program or activity funded directly by state or receives financial assistance from state. No person in the State of California shall on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

11136. Institution of hearing by state agencies administering program and activities funded directly by state to determine violation by contractor, grantee, or local agency. Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state, has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, or any regulation adopted to implement such section, the head of the state agency shall notify the contractor, grantee, or local agency of such violation and shall, after considering all relevant evidence, determine whether there is probable cause to believe that a violation of the provisions of Section 11135, or any regulation adopted to implement such section, has occurred. In the event that it is determined that there is probable cause to believe that the provisions of Section 11135, or any regulation adopted to implement such section, have been violated, the head of the state agency shall cause to be instituted a hearing conducted pursuant to the provisions of Chapter 5 (commencing with Section 11500) of this part to determine whether a violation has occurred.

11137. Action to curtail state funding to contractor, etc., violating provisions. If it is determined that a contractor, grantee, or local agency has violated the provisions of this article, the state agency that administers the program or activity involved shall take action to curtail state funding in whole or in part to such contractor, grantee, or local agency.

11138. Adoption of regulations implementing provisions. Each state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state and that enters into contracts for the performance of services to be provided to the public in an aggregate amount in excess of one hundred thousand dollars ($100,000) per year shall, in accordance with the provisions of Chapter 4.5 (commencing with Section 11371) of this part, adopt such rules and regulations as are necessary to carry out the purpose and provisions of this article.

11139. Prohibitions and sanctions imposed in addition to other prohibitions and sanctions imposed by law. The prohibitions and sanctions imposed by this article shall be in addition to any other prohibitions and sanctions imposed by law.

This article shall not be interpreted in such manner so as to frustrate its purpose.

This article shall not be interpreted in such a manner so as to adversely affect lawful programs which benefit the disabled, the aged, minorities and women.

11139.5. Standards and guidelines for determining discriminatory practices: Coordination of programs and activities. The Secretary of the Health and Welfare Agency, with the advice and concurrence of the Fair Employment Practices Commission, shall establish standards for determining which persons are protected by this article and guidelines for determining what practices are discriminatory. The Secretary, with the cooperation of the Fair Employment Practices Commission, shall assist state agencies in coordinating their programs and activities and shall consult with such agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of the provisions of the article.

Thus, the Act requires the following of state agencies who administer state-funded programs:

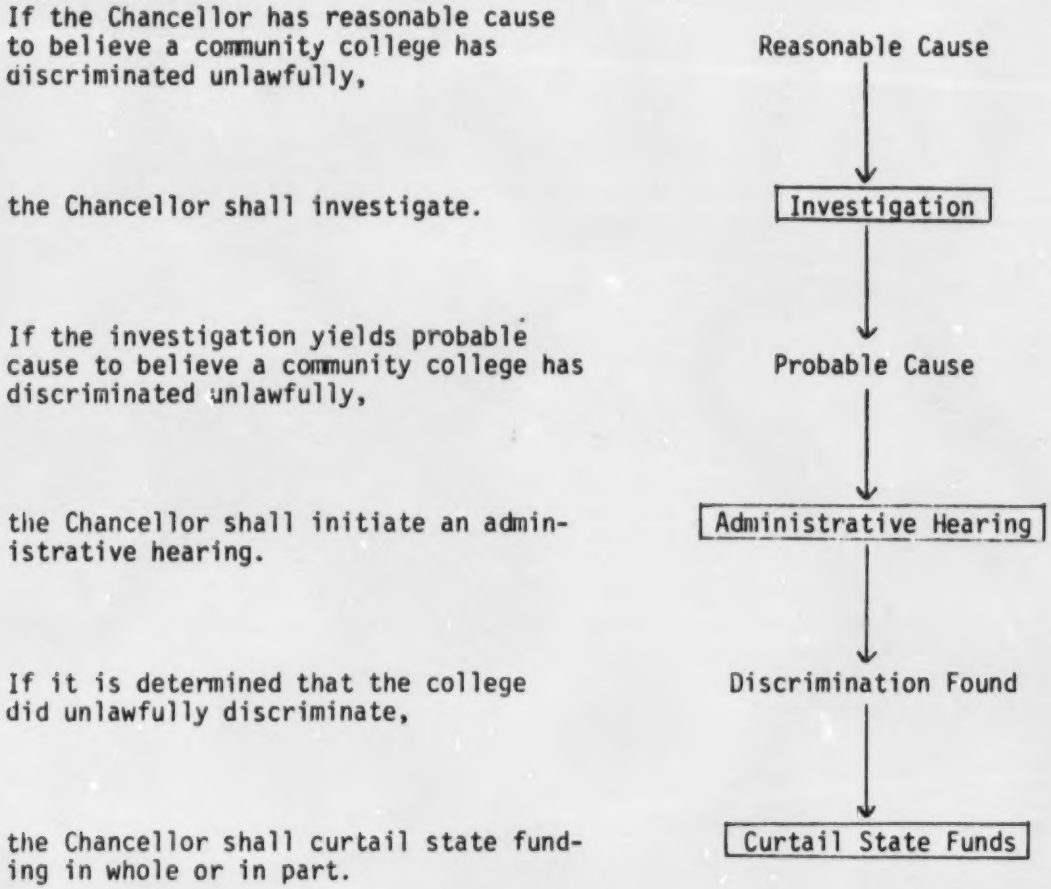
1. Investigation. When the agency has reasonable cause to believe unlawful discrimination has occurred, the agency shall investigate.

2. Administrative hearing. If the investigation shows probable cause that a violation has occurred, the agency shall initiate an administrative hearing to determine whether a violation has occurred.

3. Curtail state funds. If it is determined that a violation has occurred, the agency shall curtail funds in whole or part.

4. Adopt regulations. State agencies administering over $100,000 in state funds are required to adopt regulations to carry out the Act.

The statute, then, sets up a process with strict requirements for the Board of Governors and Chancellor. This may be shown in the following diagram:


If the Chancellor has reasonable cause to believe a community college has discriminated unlawfully,
Reasonable Cause
the Chancellor shall investigate.
Investigation
If the investigation yields probable cause to believe a community college has discriminated unlawfully,
Probable Cause
the Chancellor shall initiate an administrative hearing.
Administrative Hearing
If it is determined that the college did unlawfully discriminate,
Discrimination Found
the Chancellor shall curtail state funding in whole or in part.
Curtail State Funds

In drafting the proposed regulations, recognition was first given to two characteristics of the California Community Colleges which should be preserved:

- The "open door" admissions policy through which the California Community Colleges have been remarkably successful in their endeavor to serve all the citizens of the state.
- The local autonomy of each community college district which allows the district to respond to the needs of the unique community which it serves.

Recognition was also given to the clear fact that no student is served by withholding funds from a community college district.

The regulations, then, recognize that the first responsibility for insuring that community college programs and activities are free of discrimination based on ethnic group identification, religion, age, sex, color or disability lies with the community college district.

The proposed regulations establish a two-level process. Complaints of unlawful discrimination are received first by the community college district. The district is required to investigate the complaint but is given great discretion in determining the intensity of the investigation. The district is encouraged to resolve the matter at the district level. After the district has completed its investigation and attempted resolution, it will forward the matter to the Chancellor. The Chancellor will review the materials submitted by the district together with material submitted by the complainant and determine if further investigation is needed. Again the Chancellor is required to attempt to resolve the matter. However, if the Chancellor is unable to do so and if the Chancellor finds probable cause to believe unlawful discrimination has occurred, an administrative hearing will be held to determine whether the unlawful discrimination did occur. If it is determined that the district did discriminate, the Chancellor will take appropriate remedial action. State funds will be withheld only when compliance cannot be secured by voluntary means. The district may seek judicial review of the Chancellor's decision.

The Role of the Secretary for Health and Welfare

The Secretary for Health and Welfare is given four areas of responsibility by the statute:

- To establish standards for determining which persons are protected by the statute;
- To establish guidelines for determining what practices are discriminatory;
- To assist state agencies in coordinating their programs and activities;
- To consult with state agencies so that consistent policies, practices and procedures are adopted with respect to the enforcement of the statute.

In June 1980, the Secretary for Health and Welfare, adopted regulations for fulfilling his responsibilities under the statute. It is the opinion of the Chancellor's legal staff that the regulations go beyond the authority granted the secretary by the statute. The regulations do define protected groups and discriminatory practices, but rather than offering consultation and assistance to other state agencies, as required by the statute, the Secretary's regulations impose specific compliance mechanisms on other state agencies.

The Secretary released the first draft of his regulations to the Chancellor in October 1979. That draft of the regulations imposed a very rigid and costly compliance system on this and all other state agencies who administer state funds. The proposed regulations appeared to have been drafted for state agencies which exercise direct control over a local agency rather than for an agency such as the Board of Governors which exercises only indirect control over community college districts which are governed by locally elected Boards of Trustees. The proposed regulations also ignored the fact that it is the Board of Governors of the California Community Colleges which is the state agency responsible for the governance and

supervision of the California Community Colleges. Rather, the Secretary's proposed regulations took that responsibility from the Board of Governors and placed it with the Secretary for Health and Welfare. In December 1979, Glenn Gooder, then Interim Chancellor, and Gerald Hayward, then Chancellor-Elect, notified the Secretary that those regulations were unacceptable to the California Community Colleges and offered numerous comments.

In March 1980, the Secretary released his regulations for public comment. These regulations did reveal that the Secretary had considered the Chancellor's objections. More latitude was given state agencies to devise their own compliance mechanisms. Public hearings on these regulations were held. Members of the Chancellor's staff met with representatives for the Secretary to discuss the Chancellor's continued objections to the Secretary's regulations. However, as finally adopted, the Secretary's regulations continue to exceed the authority granted the Secretary by the statute and attempt to impose rigid components of a compliance system on other autonomous state agencies.

In preparing regulations for adoption by the Board of Governors, full consideration was given to the Secretary's regulations. Those regulations were considered as guidelines and were followed when appropriate to do so. However, when the guidelines found in the Secretary's regulations were found to be inappropriate for community colleges, other mechanisms appropriate for this system were included. In the comments to the proposed regulations, we point out where we have departed from the Secretary's regulation.

The Secretary's regulations require state agencies adopting regulations to submit their regulations to the Secretary for review prior to noticing them for public hearing. Legal counsel disputes the Secretary's authority to impose this requirement. However, as the Chancellor welcomes comment from all interested parties, we have submitted these regulations to the Secretary for his comment.

On September 29, 1980, the Secretary, through his deputy, sent his comments to each of the members of the Board of Governors. Those comments are attached as Appendix A to this item.

Cost

Article XIIIB, Section 6 of the California Constitution, as added by Proposition 4 (the Gann Initiative) contains the following requirement:

> Section 6. Whenever the Legislature or any State agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
>
> (a) Legislative mandates requested by the local agency affected:
>
> (b) Legislation defining a new crime or changing an existing definition of a crime; or

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

In addition, the State is required to reimburse community college districts for any costs which they incur as a result of regulations adopted after January 1, 1978 ("S.B. 90 Costs").

When a state agency adopts a regulation which includes reimbursable costs, the regulation "...shall be accompanied by a bill appropriating funds therefor or, alternatively, an appropriation for such funds shall be included in the Budget Bill for the next following fiscal year..." Revenue and Taxation Code, Section 2231. Use of the second alternative requires the prior approval of the Department of Finance.

Estimating the costs to community college districts of implementing these regulations was necessarily inexact. Prior to actually implementing the statute it is impossible to determine either the number of complaints which will be received or the amount of time required to investigate each complaint. No data regarding the number of complaints filed under existing law was available at the local, state or federal levels of government. Therefore, in preparing the cost estimate this data was hypothisized. It was assumed that one complaint would be received from each 1,000 students and that each complaint would require an average of six professional and two clerical hours from the district. This yields an annual cost to the districts of $175,884.

In September the proposed regulations were sent to the Department of Finance together with an estimate of their cost to community college districts and the request that that cost be included in the Governor's Budget for 1981.

The Department of Finance responded to this request on October 20, 1980. The Department noted that the Chancellor's Office was the only educational segment to have submitted regulations to implement this statute. No regulations have been submitted by the Department of Education, the University of California or the California State Universities and Colleges. The Department is reluctant to recommend funding for the implementation of this statute by only this agency at this time. Therefore, the Department has asked us to pursue costs for the regulations directly through the Legislature in a bill.

While funding to implement these regulations is sought, staff recommends that they be adopted to be operative July 1, 1981. The delayed operative date will allow resolution of the funding issue in next year's session of the Legislature. If efforts are successful, the regulations will become operative next July 1st. If legislative efforts fail, the regulations will need to be reexamined for amendments which will reduce cost.

The Proposed Regulations

The organization of the proposed regulations is set forth in the following table of contents. Following that table is the resolution for the Board's consideration, including the complete text of the regulations. A brief discussion follows each proposed regulation.

CHAPTER 5 OF DIVISION 10, PART VI, TITLE 5

NONDISCRIMINATION IN PROGRAMS RECEIVING STATE FINANCIAL ASSISTANCE THROUGH THE CHANCELLOR OR BOARD OF GOVERNORS OF THE CALIFORNIA COMMUNITY COLLEGES

Article 1. GENERAL

Section 59300 Purpose
59301 Prohibited Discrimination
59302 Academic Requirements
59303 Delegation of Authority
59304 Intent
59305 Operative Date

Article 2. DEFINITIONS

Section 59310 Incorporation by Reference

Article 3. DISTRICT COMPLIANCE AND ENFORCEMENT

Section 59320 District Responsibility
59322 District Regulations
59324 Responsible District Officer
59326 Notice to Students and Employees
59328 Complaint
59329 Complaints Filed with the Chancellor
59330 Notice to Chancellor
59332 Defective Complaint
59334 District Investigation
59336 District Resolution
59338 Notice to Complainant
59340 Forward to Chancellor

Article 4. CHANCELLOR'S PROCEDURE TO EFFECT COMPLIANCE

Section 59350 Review for Reasonable Cause
59352 Investigation
59354 Informal Resolution
59356 Formal Resolution
59358 Hearing
59360 Enforcement
59362 Judicial Review

Resolution

Be it resolved by the Board of Governors, California Community Colleges, acting under the authority of Sections 66700, 71020 and 71091 of the Education Code and Sections 11135 and 11138 of the Government Code, and implementing, interpreting and making specific Sections 11135 through 11139.5 of the Government Code, and pursuant to the Administrative Procedures Act, regulations in Title 5, Part VI of the California Administrative Code are added as follows:

Chapter 5 (Commencing with Section 59300) is added to Division 10, Part VI of Title 5 as follows:

CHAPTER 5 NONDISCRIMINATION IN PROGRAMS RECEIVING STATE FINANCIAL ASSISTANCE THROUGH THE CHANCELLOR OR BOARD OF GOVERNORS OF THE CALIFORNIA COMMUNITY COLLEGES

Article 1. GENERAL.

Comment: These regulations are divided into four articles. The first article is general and includes the statement of the Board's purpose and intent in adopting regulations.

Section 59300. Purpose. The purpose of this chapter is to implement the provisions of California Government Code Sections 11135 through 11139.5 as added by Chapter 972 of the Statutes of 1977, to the end that no person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color or physical or mental disability, be unlawfully subject to discrimination under any program or activity that is funded directly by, or that receives any financial assistance from, the Chancellor or Board of Governors of the California Community Colleges.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135-11139.5 Government Code.

Comment: The purpose of these regulations is to implement the statute.

Section 59301. Prohibited Discrimination. All programs and activities in the California Community Colleges shall be available to all qualified persons without regard to ethnic group identification, religion, age, sex, color or physical or mental disability. No person shall be denied the benefits of any community college program or activity on the basis of ethnic group identification, religion, age, sex, color or physical or mental disability.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: This section reflects the Board of Governors' policy that community college programs or activities be available to all qualified persons. Discrimination against persons on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability is anathema to the role and function of the California Community Colleges. If such discrimination is found it must be eradicated.

Section 59302. Academic Requirements. Nothing in this chapter shall be interpreted to prohibit bona fide academic requirements for a specific community college program, course or activity.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The fear has been expressed that the terms of this statute and regulations could be used to infringe on the authority of community colleges to establish legitimate and bona fide academic standards.

Section 59303. Delegation of Authority. The Board of Governors hereby delegates responsibility for implementing and enforcing the requirements of Government Code Sections 11135 through 11137 to the Chancellor, except as specifically stated in this chapter.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 71020 and 71091 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: This section delegates responsibility for the administration of these regulations to the Chancellor. Appeal from the Chancellor's decisions will be directly to Superior Court by writ of mandate.

Section 59304. Intent. It is the intent of the Board of Governors that the Chancellor assist community college districts in recognizing and eliminating unlawful discrimination from their programs and activities and in meeting the requirements of this chapter. Punitive action authorized by this chapter will be taken only when remedial action has failed to eliminate unlawful discrimination from the programs and activities of a community college district.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: Although the statute requires the Board of Governors to withhold state funds if unlawful discrimination is found, this section recognizes that the primary thrust of the Board of Governors activities under this statute should be remedial and assistive rather than punitive. Students will not be served by withholding funds from community college districts and this should be resorted to only when other measures fail.

Section 59305. Operative Date. This chapter shall be operative July 1, 1981.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The delayed operative date will allow staff to resolve state-mandated cost issues in next year's session of the Legislature.

Article 2. DEFINITIONS

Section 59310. Incorporation by Reference. Those definitions of activities prohibited by and persons protected by Chapter 972 of the Statutes of 1977 set forth in Chapters 2 and 3 of Division 8 of Title 22 of the California Administrative Code (commencing with Section 98100) are incorporated into and made applicable to this Chapter as if fully set forth here.

Comment: Originally no definitions of protected groups or prohibited activities were included in these proposed regulations as it was thought that only experience administering the regulations would illuminate the particular definitions needed in community colleges. However, of those who have offered comments regarding the regulations, at least one-third have commented that definitions were needed from the outset. The Secretary for Health and Welfare is required by the statute to adopt standards and guidelines for determining which persons are protected and what practices are discriminatory and has done so. It is suggested that these definitions be incorporated into the Boards regulations at this time. (See Appendix B) Drafting definitions unique to the California Community Colleges will be a long and difficult task which must be immediately begun. However, enforcement of the statute cannot be delayed pending the results of that process.

Article 3. DISTRICT COMPLIANCE AND ENFORCEMENT

Comment: This article assigns community college districts primary responsibility for ensuring that they do not unlawfully discriminate in their programs or activities.

Section 59320. District Responsibility. Each community college district has primary responsibility to insure that its programs and activities are available to all persons without regard to ethnic group identification, religion, age, sex, color or physical or mental disability. Therefore, each community college district shall investigate complaints of unlawful discrimination in its programs or activities, and seek to resolve those complaints.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: Each community college district is responsible for insuring that its programs and activities are available to all persons. Each community college district is uniquely able to make its programs and activities available without unlawful discrimination and to remedy any unlawful discrimination which it may find in its own programs and activities. Therefore the initial attempts to resolve complaints of unlawful discrimination will occur at the independent community college district.

Section 59322. District Regulations. Each community college district, no later than 90 days from the operative date of this chapter shall adopt and submit to the Chancellor for approval rules and regulations consistent with this article for the investigation and resolution of complaints of unlawful discrimination.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The Chancellor will supply community college districts with sample regulatons which the district may use in complying with this provision. The regulations which the Chancellor will suggest will be compatible with other affirmative action responsibilities which the districts have.

Section 59324. Responsible District Officer. Each community college district shall identify to the Chancellor and to the public a single person as the responsible district officer for insuring district compliance with this chapter.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 and 11139.5 Government Code.

Comment: Each community college district will identify one person who is responsible for district compliance with this chapter. It is not intended that this person have full-time duties for implementing this chapter, but mercly that this person be a source of information and contact for matters regarding this chapter.

Section 59326. Notice to Students and Employees. Each community college district shall notify students and employees of the provisions of this chapter.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: Students must be notified of the provisions of this chapter if the chapter is to be effective.

Section 59328. Complaint. An investigation of alleged unlawful discrimination prohibited by this chapter will be initiated by filing a complaint which meets the following requirements:

(a) The complaint shall be filed by one who alleges that he or she has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity.

(b) The complaint shall be filed with the Chancellor of the California Community Colleges or with the chief administrative officer of the appropriate community college district.

(c) The complaint shall be in a form prescribed by the Chancellor.

(d) The complaint shall be filed within 120 days of the alleged unlawful discrimination.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The procedures for investigating a complaint of unlawful discrimination are initiated by filing a complaint in conformance with the requirements of this section. In this section the proposed regulations depart from Health and Welfare's guidelines. Those guidelines suggest complaints should be accepted from any interested person. These proposed regulations require a district or the Chancellor to accept complaints only from one who alleges either that he or she has personally suffered unlawful discrimination or has learned of such unlawful discrimination in his or her official capacity. To require a community college district to investigate complaints from "any interested person" would be to impose too great a burden.

The proposed regulation also departs from Health and Welfare's guidelines in requiring that the complaint must be filed within 120 days of the alleged unlawful discrimination. Health and Welfare's guidelines suggest complaints should be accepted for a period of one year from the alleged unlawful discrimination. However, in community colleges students are in a class for only a semester or a quarter before moving on. Investigations must not occur too far after the facts being investigated if they are to help remedy unlawful discrimination.

Section 59329. Complaints Filed with Chancellor. Upon receiving a complaint filed pursuant to Section 59328, the Chancellor will forward a copy of the complaint to the appropriate community college district responsible officer who shall respond pursuant to Section 59332 or initiate the investigation required by Section 59334.

Comment. Originally the proposed regulations required that all complaints be filed with the chief administrative officer of the appropriate community college district. However, in its discussion at the October meeting, the Board expressed the fear that an individual might be hesitant to file a complaint with the local district and ought to be able to file the complaint with the state to insure the complainant will have the full protection of the State. Therefore, Section 59328 was amended to allow the complainant the option of filing the complaint with the Chancellor and this section was added as a mechanism to initiate the investigation of that complaint.

Section 59330. Notice to Chancellor. Immediately upon receiving a complaint filed in accordance with Section 59328 the district shall notify the Chancellor of the complaint in a form and manner determined by the Chancellor.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: To meet the requirement imposed by the statute that the state agency act whenever it has reasonable cause to believe discrimination has occurred, the Chancellor cannot delegate all responsibility to the community college district. The Chancellor retains responsibility and so must be informed of complaints in the community college districts.

Section 59332. Defective Complaint. When a district receives a complaint which it finds does not meet the requirements of Section 59328 the district shall immediately notify the complainant that the complaint does not meet the requirements of Section 59328 and shall specify in what requirement the complaint is defective.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: If a district determines a complaint is defective it must notify the complainant so that the complainant may remedy the defect.

Section 59334. District Investigation. Within fourteen (14) days of receiving a complaint filed in accordance with Section 59328 the district will commence an investigation of that complaint and notify the complainant that it is doing so.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The district must commence an investigation of a complaint within 14 days. The scope of the district's investigation is not prescribed. This gives the district the discretion to determine the depth of investigation required in particular circumstances.

Section 59336. District Resolution. Upon completing the investigation, the district will make findings regarding the validity of the complaint. If the district finds that unlawful discrimination has occurred, the district shall take such action as it deems necessary to correct the effects of such unlawful discrimination and to ensure that there will be no further instances of such unlawful discrimination.

Comment: As stated previously, each district is in a unique position to understand what remedial action is appropriate and necessary to end unlawful discrimination in that district. The district should take that action.

Section 59338. Notice to Complainant. Upon resolution of a complaint as required by Section 59336, the district will notify complainant of its findings and proposed resolution. The district will also notify complainant that the complainant may object to the district's findings and/or resolution by submitting those objections to the Chancellor within thirty (30) days. The notice to complainant will be in the form determined by the Chancellor.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: Each complainant should be notified of the district's findings regarding his or her complaint. The complainant must also be notified that he or she may object to the district's findings to the Chancellor.

Section 59340. Forward to Chancellor. Upon sending the notice pursuant to Section 59338 and within ninety (90) days of initiating the investigation required by Section 59334 the district will forward the following to the Chancellor:

(a) The original complaint,

(b) Report of the nature and extent of the investigation conducted by the district;

(c) Statement of the district's findings;

(d) Report of any action taken to resolve the complaint;

(e) Evidence that the district has complied with the requirements of Section 59338;

(f) Such other information as the Chancellor may require.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The community college district is required to complete its investigation within ninety (90) days of its initiation. The district must then forward a report of the investigation, findings and district action to the Chancellor together with the original complaint and evidence that the district has notified the complainant of his right to object. The Chancellor may require other information as he deems necessary. These materials forwarded to the Chancellor form the basis for the Chancellor's investigation.

Article 4. CHANCELLOR'S PROCEDURE TO EFFECT COMPLIANCE

Comment: The Chancellor's role in this procedure begins when the district has completed its investigation and taken action as it deems appropriate.

Section 59350. Review for Reasonable Cause. (a) The Chancellor shall review the materials submitted by the district pursuant to Section 59340, together with any objection submitted by the complainant, and determine whether there is reasonable cause to believe the district has violated the requirements of this chapter.

(b) Failure by the complainant to file an objection pursuant to Section 59338 shall not preclude the Chancellor from finding reasonable cause to believe the district has violated the requirements of this chapter.

(c) If the Chancellor finds there is no reasonable cause to believe a violation has occurred, the Chancellor shall immediately notify both the complainant and the district.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The Chancellor must first determine whether there is reasonable cause to believe unlawful discrimination has occurred. This determination will be made based on the materials submitted by the district and any objection submitted by the complainant. Failure by the district to submit complete materials will certainly indicate that further investigation by the Chancellor is necessary.

Section 59352. Investigation. If the Chancellor finds there is reasonable cause to believe a violation has occurred, the Chancellor shall investigate to determine whether there is probable cause to believe a violation has occurred.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The statute requires the Chancellor to investigate if there is reasonable cause to believe unlawful discrimination has occurred. Reasonable cause is not defined.

Section 59354. Informal Resolution. During the course of the investigation, the Chancellor shall seek to informally resolve the alleged violation. Such resolution shall be set forth in a written conciliation agreement. A copy of the written agreement shall be sent to the complainant.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: At all times during the Chancellor's investigation, the Chancellor will seek to resolve the matter. The resolution will be set forth in a written conciliation agreement. A copy of that agreement will be sent to the complainant. However, the complainant is not a part to the agreement and need not acquiesce in the agreement.

Comment: Health and Welfare's regulations require state agencies to submit written conciliation agreements to the Secretary. The Chancellor's legal counsel has opined that the Secretary for Health and Welfare does not have the authority to impose this mandate and it is believed that this requirement would discourage such written conciliation agreements. Therefore, this provision is not included in these regulations.

Section 59356. Formal Resolution. Within 120 days of initiating the investigation, the Chancellor shall:

(a) Notify the district and the complainant that there is probable cause to believe the district has violated the provisions of this chapter. The Chancellor shall allow the district to acquiesce in this finding prior to filing an accusation against the district.

(b) Notify the district and the complainant that there is no reasonable cause to believe the district has violated the provisions of this chapter.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: This provision allows the Chancellor 120 days to complete his investigation. If the Chancellor finds probable cause to believe unlawful discrimination has occurred, the district shall be allowed to acquiesce in this finding. If the district does so, it will avoid the necessity of a hearing pursuant to the Administrative Procedures Act and the provisions of Section 406 will immediately be applicable.

Section 59358. Hearing. If the Chancellor finds the district has violated the provisions of this chapter, and if the district does not acquiesce in that finding, the Chancellor shall initiate the hearing process pursuant to Chapter 5 (commencing with Section 11500) of Part I, Division 3, Title 2 of the Government Code, to determine whether the violation did occur.

Comment: The statute requires that if the Chancellor finds probable cause to believe a community college district has unlawfully discriminated in its programs or activities it shall initiate a hearing pursuant to the Administrative Procedure Act to determine whether the violation did occur. This provision meets that requirement.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Section 59360. Enforcement (a) Upon a determination that a district has violated the provisions of this chapter, the Chancellor shall notify the district of the action he or she will take to effect compliance. The Chancellor may use any means authorized by law to effect compliance, including:

(1) Withhold all or part of the district's state support;

(2) Probationary eligibility for future state support, conditional on compliance with specified conditions;

(3) Proceeding in a court of competent jurisdiction for an appropriate order compelling compliance.

(b) No decision to curtail state funding to a district under this chapter shall be made until the Chancellor has determined that compliance cannot be secured by voluntary means.

NOTE: Authority cited: Sections 11135 and 11138 Government Code; Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The statute provides that if the state agency finds the recipient has practiced unlawful discrimination the state agency shall curtail state funding in whole or in part. This proposed regulation recognizes that no student will be served by curtailing state funds to a community college district and encourages the Chancellor to utilize other measures to compel compliance before withholding funds.

Section 59362. Judicial Review. A decision by the Chancellor pursuant to Section 59360 is subject to judicial review by the district, as provided by Section 1094.5 of the Code of Civil Procedure.

NOTE: Authority cited: Sections 11135 and 11138 Government Code: Sections 66700 and 71020 Education Code. Reference cited: Sections 11135 through 11139.5 Government Code.

Comment: The Chancellor's decision to enforce the provisions of this chapter under Section 59360 will have followed a hearing before an administrative law judge at which it was determined that the district did practice unlawful discrimination. The decision of the Chancellor to enforce the provisions of this article should not then be subject to further administrative proceedings. It should be appealed directly to the courts.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

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Mario G. Obledo
SECRETARY

James W. Connor
UNDERSECRETARY

September 29, 1980

MEMBERS OF THE BOARD OF GOVERNORS
OF THE CALIFORNIA COMMUNITY COLLEGES

Re: Proposed California Community Colleges Regulations

Article 9.5 of the Government Code prohibits discrimination in state supported programs or activities based on ethnic group identification, religion, age, sex, color, or a physical or mental disability. Section 11139.5 of Article 9.5 requires that the Secretary of the Health and Welfare Agency, with the concurrence of the Fair Employment and Housing Commission, establish standards for determining which persons are protected by Article 9.5 and guidelines on what practices are discriminatory.

The Secretary, with the cooperation of the Fair Employment and Housing Commission, is further required to assist state agencies in coordinating their programs and activities and consult with such agencies as necessary so that consistent policies, practices and procedures are adopted with respect to the enforcement of the provisions of the article.

We have been informed that your honorable board will be discussing regulations proposed by your staff to implement the provisions of Article 9.5 on October 23 and 24, 1980. We wish to advise you that the proposed regulations (copy attached) neither conform to the Secretary's Standards and Guidelines (22 California Administrative Code Section 9800 et seq.), nor meet the consistency intent of Government Code Section 11139.5. We, therefore, ask that they not be approved in their present form.

The overriding goal of Article 9.5 is the prevention of discrimination in state supported programs or activities. While in no way implying intent to this affect--instead of establishing a system for the vigorous enforcement of Article 9.5--the regulations which will be presented to you contain a subtle message to the contrary to those who will be expected to comply with them.

The dubious premise on which the proposed regulations are founded is set out on page 4 of the explanatory introduction as follows:

> "...The proposed regulations are intended to (place) ...as little burden and intrusion on the community college districts as possible..."

With due recognition of the importance of voluntary compliance, Article 9.5, as any other civil rights law, is not meant to make discrimination uncomfortable or merely inconvenient. Prevention of discrimination through the assurance that onerous punitive action will surely follow such practices is the method set forth in the act.

Of equal importance, the proposed regulations contain no definitions. Thus, how can a community college district of other recipient of state funds know what is prohibited, what is permitted, or even who is protected by the act? Similarly, how will the beneficiaries of the state supported program or activity know they are covered or the unlawful practices from which they are protected? Without definitions, how can discriminatory practices be avoided or how can those protected know of and secure their rights?

Such a glaring omission, by itself, would nullify the proposed regulations. For this reason, and numerous other shortcomings set forth in the accompanying section-by-section review, we cannot more strongly express our disapproval of the proposed regulations. They are contrary to the spirit and terms of both Article 9.5 and the Standards and Guidelines promulated to implement the act.

We urge that the Standards and Guidelines and the Explanatory Comments thereto, copies of which are attached for your information, be looked to for guidance in the redrafting of the proposed regulations. We are more than glad to lend whatever assistance we can in your staff's completion of that task.

Very truly yours,

WILLIAM WILDER
Deputy Secretary

Attachments
Enclosure

cc: Gerald C. Hayward, Chancellor, California Community College
Catherine Close, Staff Counsel, California Community Colleges
David Garcia, Executive Director and Staff Counsel, FEHC
Mario G. Obledo, Secretary, Health and Welfare Agency

SECTION-BY SECTION REVIEW
OF PROPOSED REGULATIONS
OF CALIFORNIA COMMUNITY COLLEGES

I. ROLE OF SECRETARY OF HEALTH AND WELFARE IN REVIEW OF PROPOSED REGULATIONS

At pages 5 and 6 of the introductory explanation to the regulations, it is asserted that "the Secretary's regulations impose specific compliance mechanisms on other state agencies" "exceed the authority granted the Secretary by the statute, and attempt to impose rigid components of a compliance system on other autonomous state agencies". These statements misconstrue the Secretary's role.

Government Code Section 11139.5 provides that:

> The Secretary of the Health and Welfare Agency, with the advice and concurrence of the Fair Employment and Housing Commission, shall establish standards for determining which persons are protected by (Article 9.5) and guidelines for determining what practices are discriminatory. The Secretary, with the cooperation of the Fair Employment and Housing Commission, shall assist state agencies in coordinating their programs and activities and shall consult with such agencies, as necessary, so that consistent policies, practices and procedures are adopted with respect to the enforcement of the provisions of (Article 9.5).

The Secretary is thus expressly required to establish definitions for protected persons and prohibited practices. The Standards and Guidelines contain such definitions. In addition, the Secretary is required to ensure consistency among the enforcement mechanisms of the innumerable state agencies which will have to implement Article 9.5.

The Standards and Guidelines are the end product of the Secretary's exhaustive review of law and policy in the civil rights enforcement field. Moreover, the Standards and Guidelines' enforcement provisions establish a benchmark which state agencies can look to for reference in the formulation of their own enforcement systems. Thus, the Standards and Guidelines' enforcement mechanisms are guides which will help state agencies formulate their enforcement mechanisms and, at the same time, will assist the Secretary in his role of assuring consistency among enforcement mechanisms. It will be more likely that similar matters are treated in similar fashion regardless of the state agency in which they arise if all state agencies look to the same point of reference for guidance.

Implementing regulations of state agencies cannot vary significantly from the definitions of protected persons and prohibited practices set out in the Standards and Guidelines. However, such definitions can be adapted to the particular programs or activities which receive such state agencies' support. Such adaptation, however, cannot be inconsistent with the Standards and Guidelines definitions. The enforcement mechanisms created by each state agency have greater latitude for variation. The only requirement is that the various mechanisms be found consistent by the Secretary.

We submit that in light of this expressly authorized regulatory framwork, the statements contained in the introductory explanation to the proposed regulations are grossly in error.

II. RELATIONSHIP BETWEEN DISTRICT AUTONOMY AND ARTICLE 9.5

Sprinkled throughout the proposed regulations are statements stressing the need to maintain the independence of the constituent districts of the California Community College System. Toward that end, the proposed regulations purport to authorize each district to promulgate its own complaint investigation regulations and to implement such regulations through complaint investigation and resolution. (See proposed Sections 59320 and 59322 and comments thereto). Such provisions are contrary to the need for the implementation of consistent enforcement mechanisms set forth above and also contrary to the requirement in Government Code Section 11136 that investigations be conducted by state agencies.

As set out in Section I above, the Secretary is expressly required by Article 9.5 to ensure consistent Article 9.5 enforcement mechanisms are adopted by state agencies. Proposed Section 59322 would make oversight by the Secretary virtually impossible because each individual community college district would be promulgating its own enforcement system. Thus, that aspect of the proposed regulations is inappropriate.

Of greater concern, however, is the extent to which the proposed regulations purport to delegate complaint resolution to the districts.

One of the primary purposes of Article 9.5 was to make each state agency responsible for determining whether discriminatory conduct has occurred and what sanctions are appropriate. This was to get away from the obvious conflict of interest involved if recipients of state funds were allowed to investigate themselves to determine if they had violated the law.

We are aware of the provisions in the Education Code which emphasize the independece of the individual districts. However, we believe the Legislature was thereby emphasizing the autonomy of the districts in the setting of educational policy, not with the role of the districts with respect to civil rights. In article 9.5, on the other hand, the Legislature has expressed in no uncertain terms that:

> Whenever a state agency .... has reasonable cause to believe that (a violation of Article 9.5 has occurred), ... the head of the state agency shall notify the (alleged violator) and shall, after considering all relevant evidence, determine whether there is probable cause to believe that a violation of the provisions of (Article 9.5), has occurred. In the event that it is determined that there is probable cause to believe that (Article 9.5 has) been violated, the head of the state agency shall cause to be instituted a hearing conducted pursuant to (the Administrative Procedure Act) to determine whether a violation has occurred. (Government Code Section 11136 (Emphasis Added).

Thus, the Standards and Guidelines were carefully drafted to allow state agencies to delegate certain aspects of the investigation function to recipients so long as such delegation did not include either the duty to determine the ultimate fact of discrimination or denial of benefits or the duty to determine the appropriate sanction to be imposed. (See 22 Cal. Admin. Code Section 98342; see also Explanatory Comments to Standards and Guidelines Implementing Government Code Sections 11135-11139.5 at page 28).

As presently structured, the complaint investigation and resolution system created by the proposed regulations sacrifices the protection of ultimate beneficiaries to the preservation of the autonomy of the districts. As such, it is wholly inconsistent with Article 9.5 and the Standards and Guidelines.

III. REVIEW OF SPECIFIC PROVISIONS OF PROPOSED REGULATIONS

Our comments set forth below relate to specific sections of the proposed regulations as indicated.

Sections 59300-59301

The provisions in these sections are acceptable.

Section 59302

Community College Districts may properly consider bona fide academic requirements in deciding whether to accept or reject applicants for community college classes or community college employment. However, that concept must be refined to ensure that such requirements do not constitute artificial barriers to the admission or employment of protected groups under Article 9.5. Provisions similar to those contained in the Federal Department of Health and Human Services' government-wide Section 504 requirements as set out in Title 45, beginning at Section 84.11 (employment practices) and Section 84.41 (post-secondary education) should be incorporated into the proposed regulations. It does not appear that consideration has been given to the avoidance of academic requirements which may screen out protected groups from such benefits.

Section 59303

No comment.

Section 59304

As set out above, we object to the language in this section and the comment which follows it insofar as the intention set forth is that disciplinary action in the form of State support curtailment will only occur in the most egregious of circumstances, and that only as a last resort. The record of the community colleges indicates that the use of Article 9.5 as a swift and sure remedy is badly needed as an enforcement tool to compel community college districts to comply with nondiscrimination requirements. SB 1620, Chapter 766, Statutes of 1978, required all community colleges to promulgate affirmative action plans for employment. As of August 1980, 52 of the 70 districts are out of compliance with the plan requirement. Accordingly, we suggest that this section and its accompanying commentary be redrafted to assert a more forceful role for the Chancellor in the administration of Article 9.5.

Article

As set out above, we believe that the absence of definitions nullifies the proposed regulations in total. As a legal matter, the definitions set out in the Standards and Guidelines promulgated by the Secretary and the Fair Employment and Housing Commission will apply. However, more specific definitions are necessary for the narrow field of higher education administered by the Chancellor and the Board of

Governors of the California Community Colleges. We pointed out this requirement when we discussed the matter with your staff counsel in our office at the time that we were drafting the Standards and Guidelines. Most importantly, as we emphasized above, without definitions, ultimate beneficiaries will not know their remedies and community college districts will not know their responsibilities.

Sections 59230 and 59322

Section 59320 and Section 59322, with their accompanying commentaries, fly in the face of the consistency objective in Article 9.5 discussed above. The delegation of responsibility to the community districts set out in these provisions would jeopardize enforcement of Article 9.5.

Section 59324

By what date will such a district officer be appointed? By whom will such officer be appointed? How will such officer be appointed? These issues must be resolved in the proposed regulations in order to assure meaningful implementation of Article 9.5.

Section 59326

How will such notification take place? Who will conduct such notification? By what date must such notification take place? These issues must be resolved in order to assure a meaningful implementation of Article 9.5.

Section 59328

As presently written, Subsection (a) would prohibit parents from filing complaints on behalf of their children. This illustrates the narrow manner in which the subsection has been drafted. The critical question is not the identity of the person who files the complaint, but whether the state agency has reasonable cause to believe that a violation of Article 9.5 might have occurred. The source of information with respect to such discrimination is not as important as the fact that such information has been obtained by the state agency.

We suggest a redrafting of Subsection (a) to eliminate these problems.

Subsection (b) refers to the filing of a complaint with the community college district. Although a later section requires a community college district to forward complaints to the Chancellor, it would be desirable to have such a requirement in this subsection for clarity.

Subsection (c) does not identify the form of the complaint or the time when such form will be ready for distribution. These defects must be addressed.

Subsection (d) is contrary to the one year statute of limitations set out in the Standards and Guidelines. Accordingly, the 120 day limitation is improper. The analogous provision under the Fair Employment and Housing Commission is one year. The analogous provision under Federal law is 300 days.

The commentary to this section refers to the "great burden" which would be imposed on college districts (or, more appropriately, the Chancellor) if any interested person could file a complaint. There is no indication or reference to evidence of greatly increased hardship which might result from the processing of additional complaints. In addition, as we described in our explanatory comment to the Standards and Guidelines, the courts have developed a reasonably limited definition of an "interested" person for purposes of standing in administrative proceedings. Such a limitation would reduce, if not eliminate altogether, any undue hardship which might be shown. Accordingly, the commentary is ill-conceived.

Section 59300

This section, as well as Sections 59332, 59334, 59338, 59339 and 59340 contain references to other sections which are not contained in the proposed regulations. Such references are confusing and should be eliminated or clarified.

The substance of Section 59330 is unobjectionable except for the omission of a time deadline for the preparation of a complaint form by the Chancellor. With such modification, the section would be acceptable.

The commentary to this section once more reveals the intent to delegate all but the least amount of responsibility to the districts. As set forth above, such intent is contrary to Article 9.5.

Section 59332

Defects of form are almost indistinguishable from defects of substance.

What standards are the districts to use in screening complaints for compliance with the requirements of Section 305 (Sic: 59328?). Simultaneous review of complaints by the Chancellor would greatly diminish the possibility that

substantively valid complaints might be rejected by the district on the basis of defects in form. As emphasized above with respect to the issue of delegation, it is the responsibility of the Chancellor to determine whether reasonable cause exists for the institution of an investigation or "compilation of evidence." Once the Chancellor makes such a determination, the district may be delegated the responsibility for compiling all relevant evidence.

Section 59334

We have no objection to the initiation of investigations, or compilation of evidence, within 14 days of the receipt of a complaint. However, we object to the delegation of authority to the district, as set out in the comment, "to determine the depth of investigation required in particular circumstances." This is an improper delegation for the reasons set forth above.

Section 59336

This section raises the issue of delegation once more. We suggest the first sentence by redrafted to accord with our discussion above with respect to the role of districts in relationship to the role of the Chancellor under Article 9.5. The district may make recommended findings with respect to complaints, but determinations regarding the validity of complaints are for the Chancellor to make.

Section 59338

As presently drafted, this section incorporates the defects of the delegation of authority to the districts criticized above. Moreover, it is unclear from the section whether the burden is on a complainant to object to the district's findings and/or resolutions before such matters can be determined by the Chancellor. Finally, the specified notice to the compalinant has not been identified nor has a time limit for preparation of the notice form been set out.

Section 59340

The notice procedure set forth in this section incorporates the improper delegation of authority to the district. The consequent delay in the consideration of the matter by the Chancellor is thus necessarily contrary to Article 9.5. The Chancellor must make the initial determination of whether there is reasonable cause to institute an investigation or compilation of evidence. Such determination is not a reviewing procedure by the Chancellor; it is the Chancellor's responsibility at the outset.

Section 59350

The provisions of this section follow closely the assumptions set forth in the previous article describing the procedure to be followed by districts upon receipt of a complaint. Thus, the section suffers from the same shortcomings

Moreover, it is not entirely clear that the Chancellor is required to make a determination of whether there is reasonable cause to believe that a violation has occurred even absent notice and objections submitted by the complainant. Thus, it is not clear whether an additional obstacle has been placed in the path of complainants who seek relief from violations by the districts.

Section 59352

The section as proposed is unobjectionable. However, the context in which it is placed, arising after an investigation by the districts, is inappropriate for the reasons set forth above with respect to the improper delegation of authority to districts.

The comment to the section refers to the absence of a definition for "reasonable cause." We have included an explanation of that term and of "probable cause" in our explanatory comments to the Standards and Guidelines. In essence, both are factual determinations. The reasonable cause determination is based on the face of a complaint or other information which brings the possible existence of a violation to the attention of the Chancellor. The probable cause determination is based on the results of the complete compilation of evidence resulting from an investigation.

Section 59354

The provisions of this section are consistent with Article 9.5 and the Standards and Guidelines.

The last line of the comment to the proposed section providing that the complainant is not a party to the agreement and need not acquiesce in the agreement is consistent with the Standards and Guidelines under Article 9.5.

There are three interests to be considered: (1) The interest of the Chancellor in obtaining a resolution in the particular instance which will benefit the entire program or activity, not just the particular complainant

involved, (2) the interest of the district in doing whatever the Chancellor requires to remedy the problem raised by the complaint in question and placing the complaint behind it, and (3) the interest of the complainant in obtaining a resolution to the particular problem to his or her satisfaction. Under the mechanisms for enforcement of Article 9.5 pursuant to the Standards and Guidelines, state agencies will be primarily responsible for going forward on complaints. With this additional burden goes the discretion to consider the impact of a proposed informal resolution on the entire program or activity as well as on the complainant, if there is one, involved in a complaint proceeding. This discretion, which provides state agencies with flexibility in formulating remedial actions, would be jeopardized if complainants could stymie the informal resolution. If complainants are dissatisfied with a proposed resolution, they may challenge such resolution in court through a writ of mandate.

In summary, therefore, a balancing of the interests involved in the informal resolution process results in the exclusion of a requirement that complainants agree to a proposed informal resolution. Since Section 59354, with its accompanying comment, accomplishes this result, it is consistent with Article 9.5 and the Standards and Guidelines.

In contrast, the exclusion of a requirement that the Chancellor submit written conciliation agreements to the Secretary of Health and Welfare is inconsistent with the express terms of the Standards and Guidelines at 22 California Administrative Code Section 98347. Since it is anticipated that a major proportion of complaints will be resolved through formal or informal arrangements, it is critical to the Secretary's carrying out of the responsibility to assure consistent enforcement of Article 9.5 that the Secretary be provided with copies of conciliation agreements. As explained in the explanatory comments to the Standards and Guidelines, only executed conciliation agreements need be so forwarded.

Therefore, to the extent that Section 59354 contains no provision for the forwarding of conciliation agreements to the Secretary, it is inappropriate. It is noteworthy that the comment to proposed Section 59354 contains no explanation for the basis of the exclusion of this provision. A terse "it is believed that this requirement would discourage such written conciliation agreements" is wholly inadequate.

Section 59356

This section suffers from the same shortcomings as previous sections containing an improper delegation of authority to districts. The Chancellor's intercession, coming after district action has taken place, is inconsistent with Article 9.5 and the Standards and Guidelines.

We have no objection to shortening the time for investigation from 180 days, as provided in 22 California Administrative Code Section 98348, to 120 days, as provided in this proposed section. In contrast to the proposed shortening of the statute of limitations in proposed Section 59328, the shortening of the time for investigation in this proposed section would have the effect of affording greater protection to ultimate beneficiaries, and is thus consistent with Article 9.5 and the Standards and Guidelines.

Proposed Subsection 59356 (a) would allow the district to "acquiesce" in a finding of probable cause by the Chancellor. We object to this provision as being an open-ended opportunity for delay in the enforcement process. No time limitations for such acquiescence are provided. Therefore, as written, Subsection (a) is inconsistent with Article 9.5 and the Standards and Guidelines.

Subsection 59356(b) refers to a finding of reasonable cause. This appears to be a typographical error. It should read "probable cause."

Finally, the comment to proposed Section 59356 makes a reference to the provisions of Section 406. There is no 406 in the proposed regulations. The reference appears to be incorrect.

Section 59358

As written, the section is unobjectionable. However, no provisions are included in the proposed regulations with respect to the hearing process. (See 22 California Administrative Code Sections 98360-98366). Thus, the proposed regulations fail to identify the parties to the hearing, fail to make provisions for amicus curiae participation, fail to provide for expedited hearings, fail to provide for relief pending hearings, and fail to provide for the forwarding of hearing decisions to the Secretary of Health and Welfare. Acordingly, this omission is inconsistent with Article 9.5 and the provisions of the Standards and Guidelines.

Section 59360

Although Subsection 59360(a) closely parallels the provisions in the Standards and Guidelines at 22 California Administrative Code Section 98370, the beneficial effects of Subsection 59360(a) are nullified by Subsection 59360(b). Subsection 59360(b) reflects the statement in the comment that the Chancellor will utilize "other measures" to compel compliance before withholding funds. We discussed this issue at length with respect to the sections reviewed above. Government Code Section 11137 provides in no uncertain terms that a finding of a violation must be followed by sanctions under Article 9.5. Thus, the Chancellor would have no discretion to "determine that compliance cannot be secured by voluntary means." The practical effect of such discretion is clear; it would result in still further delay in the enforcement of Article 9.5. Moreover, the power to make such "determination" is accompanied by no standards for its exercise. Accordingly, Subsection 59360(b) is inconsistent and incompatible with Article 9.5 and the Standards and Guidelines.

Section 59362

We have no objection to the terms of this section. However, it should be emphasized that judicial review of the Chancellor's decision under Article 9.5 would not be an "appeal" as such. Thus, sanctions imposed by the Chancellor would remain in effect unless stayed by a court order issued upon a proper showing by the district.

General Comments

The proposed regulations suffer from numerous omissions which render them inconsistent with Article 9.5 and the Standards and Guidelines. For example, there is no reference to the inclusion of subcontractors, there is no reference to the Chancellor's right to have access to records of compliance of districts and there is no reference to the inclusion of procurement contracts for employment. Standards and Guidelines for these provisions are included in 22 California Administrative Code Section 98000, et seq.

APPENDIX B

Definitions of activities prohibited by and persons protected by Chapter 972 of the Statutes of 1977 excerpted from Chapters 2 and 3 of Division 8 of Title 22 of the California Administrative Code.

98101. Discriminatory Practices Applicable to All Persons.

It is a discriminatory practice for a recipient, in carrying out any program or activity directly, or through contractual, licensing or other arrangements, on the basis of ethnic group identification, religion, age, sex, color, or a physical or mental disability:

(a) to deny a person the opportunity to participate in, or benefit from an aid, benefit or service;

(b) to afford a person the opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others;

(c) to provide a person with an aid, benefit or service that is not as effective in affording an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. In some situations, identical treatment may be discriminatory;

(d) to provide different or separate aid, benefits or services to a person, or to any class of persons, than is provided to others, or to provide aid, benefits or services at a different time, unless such action is clearly necessary to provide such persons with an equal opportunity to receive as truly effective aid, benefits or services as those provided to others;

(e) to aid or perpetuate discrimination by transferring State support to another recipient that discriminates in providing any aid, benefit, or service;

(f) to exclude a person from participation as a member of a planning or advisory board. Under this requirement, it is a discriminatory practice for a recipient to fail to make reasonable efforts to achieve a representative board. However, such requirement is not deemed to impose adherence to a quota system;

(g) to otherwise limit a person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving any aid, benefit or service resulting from the program or activity;

(h) to deny a person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities;

(i) to utilize criteria or methods of administration that:

(1) have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification, religion, age, sex, color, or a physical or mental disability;

(2) have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient's program with respect to a person of a particular ethnic group identification, religion, age, sex, color, or with a physical or mental disability; or

(3) perpetuate discrimination by another recipient on the basis of ethnic group identification, religion, age, sex, color, or a physical or mental disability.

(j) to make or permit selections of sites or locations of facilities:

(1) that have the purpose or effect of excluding persons from, denying the the benefits of, or otherwise subjecting them to discrimination under any program or activity;
(2) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to a person of a particular ethnic group identification, religion, age, sex, color, or with a physical or mental disability.

98102. Interpretation of Section 98101.
The provisions of Section 98101 are not intended:
(a) to limit, by the enumeration of specific forms of prohibited discrimination, the general prohibition against discrimination set forth in Section 98100;
(b) to adversely affect lawful programs which benefit persons of a particular ethnic group identification, religion, age, sex, color, or with a physical or mental disability to overcome the effects of conditions that result or have resulted in limited participation in, or receipt of benefits from, any State supported program or activity; or
(c) to prohibit or require actions or practices otherwise allowed or not required under Chapter 3 of this Division.

98210. Definitions.
(a) "Alternative communication services" means the method used or available for purposes of communicating with a person unable to read or speak or write in the English language. "Alternative communication services" include, but are not limited to, the provision of the services of a multilingual employee or an interpreter for the benefit of an ultimate beneficiary and the provision of written materials in a language other than English.
(b) "Color or ethnic group identification" means the possession of the racial, cultural or linguistic characteristics common to a racial, cultural or ethnic group or the country or ethnic group from which a person or his or her forebears originated.
(c) "Interpreter" means a qualified person capable of translating a language, orally or in writing, between people who speak, read or write a different language.
(d) "Multilingual employee" means an employee of a recipient who, in addition to his or her other duties, is also proficient in the oral communication skills and such minimal reading and writing skills, where applicable, as are necessary to accurately and readily interpret in a second language. A multilingual employee need not be proficient in reading or writing skills in a second language except where such skills are a job-related necessity.
(e) "Non-English-speaking persons" means persons who either do not speak English or are unable to effectively communicate in English because English is not their native language.
(f) "Primary language" means the language used most frequently by a person to communicate, including sign language.

98211. Discrimination Prohibited.

It is a discriminatory practice for a recipient:

(a) to discriminate against a person because of such person's association with persons of a particular color or ethnic group identification;

(b) to discriminate against a person because of such person's membership in an organization identified with, or seeking to promote the interests of persons of a specific color or ethnic group identification or because a person's name, or that of his or her spouse, is believed to reflect a given color or ethnic group identification;

(c) to fail to take appropriate steps to ensure that alternative communication services are available to ultimate beneficiaries, except where the State agency determines that such a requirement would place an undue hardship on the recipient.

98220. Religion Defined.

The term "religion" includes all aspects of religious observance, practice and belief, including duties of the clergy or elders. A belief is religious if sincerely held and, in the scheme of the believer, holds a place analogous to that filled by the deity of those people whose religion may be more orthodox or more widely accepted.

98221. Reasonable Accommodation.

It is a discriminatory practice where a recipient of State support fails to make reasonable accommodation to the religious belief of an ultimate beneficiary where such accommodation can be made without undue hardship on the recipient or other ultimate beneficiaries.

98223. Discrimination Prohibited.

It is a discriminatory practice for a recipient of State support to discriminate against an ultimate beneficiary based on the nature of the ultimate beneficiary's religious beliefs.

98230. Definitions

(a) "Action" means any activity, policy, rule, standard, or method of administration undertaken by a recipient; or the use of any policy, rule, standard, or method of administration by a recipient.

(b) "Age" means how old a person is, or the number of elapsed years from the date of a person's birth.

(c) "Age distinction" means any action using age or an age-related term.

(d) "Age-related term" means a word or words which necessarily imply a particular age or range of ages (for example: "children", "adult", "older persons", but not "student").

98231. Statutory Exceptions to the Rules Against Age Discrimination.

It is not a discriminatory practice for a recipient to take any action otherwise prohibited by Sections 98100-98101 if such action is based on a Federal statute or regulation, State statute or regulation, or local ordinance consistent with this Division adopted by an elected, general purpose legislative body and which:

(a) provides any benefits or assistance to persons based on age;

(b) establishes criteria for participation in age-related terms; or

(c) describes intended beneficiaries or target groups in age-related terms.

98232. Definition of "Normal Operation" and "Statutory Objective".

For purposes of Sections 98233 and 98234, the terms "normal operation" and "statutory objective" have the following meanings:

(a) "Normal operation" means the operation of a program or activity without significant changes that would impair the recipient's ability to meet the objectives of such program or activity.

(b) "Statutory objective" means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance consistent with this Division adopted by an elected general purpose legislative body.

98233. Exceptions to the Rules Against Age Discrimination: Normal Operation or Statutory Objective of Any Program or Activity

It is not a discriminatory practice for a recipient to take an action, otherwise prohibited by Sections 98100-98101, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

(a) age is used as a measure or approximation of one or more other characteristics;

(b) the other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(c) the other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) the other characteristic(s) are impractical to measure directly on an individual basis.

98234. Exceptions to the Rules Against Discrimination: Reasonable Factors Other Than Age.

It is not a discriminatory practice for a recipient to take an action otherwise prohibited by Sections 98100-98101 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages, provided that such other factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

98235. Burden of Proof.

The burden of proving that an age distinction falls within the exceptions of Sections 98231, 98233 or 98234 is on the recipient of State support.

98240. Parental, Family or Marital Status.

Any rule, policy or practice of a recipient concerning the actual or potential parental, family or marital status of an ultimate beneficiary which has the purpose or effect of differentiating on the basis of sex is a discriminatory practice.

98241. Personal Information.

In determining whether a person satisfies any critera for receipt of an aid or benefit or participation in a program or activity, it is a discriminatory practice for a recipient to differentiate on the basis of

sex in inquiring about the family or marital status of such person. However, such person may be required to provide information relevant and necessary for determining whether such person satisfies validly imposed criteria for the aid or benefit, or participation in the program or activity in question, including any other former names by which such person has been known.

98242. Pregnancy, Childbirth or Termination of Pregnancy.
Any rule, policy or practice of a recipient concerning disability due to pregnancy, childbirth, recovery from childbirth or termination of pregnancy, or other physiological conditions related to the capacity to bear children not applied under the same terms and conditions, and in the same manner, as any other rule, policy or practice relating to any other temporary disability is a discriminatory practice; except as otherwise provided by the Fair Employment Practice Act.

98243. Statistical Stereotypes.
Any rule, policy or practice which treats men and women differently for purposes of any program or activity on the basis of aggregate statistical characteristics of men or women, whether founded in fact, belief or statistical probability is a discriminatory practice.

98244. Sex Pressure Prohibited.
Any rule, policy, practice or incident by a recipient is a discriminatory practice where a supervisor, superior, or other person subject to the control of a recipient of State support, conditions the receipt of benefits of a program or activity upon entering into, or maintaining a sexual relationship or participation in sexual activity or subjects an ultimate beneficiary to sexual harassment or intimidation such as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.

98250. Definitions.
(a) "Disabled person" means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
(b) as used in subsection (a) of this section, the phrase "physical or mental impairment" means:
(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; muscoloskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(3) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(4) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) "Is regarded as having an impairment" means:

(A) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;

(B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(C) has none of the impairments defined in subsection (b) (1) of this section but is treated by a recipient as having such an impairment.

(c) "Disability" means any condition or characteristic that renders a person a disabled person as defined in subsection (a) of this section.

(d) "Qualified disabled person" means:

(1) with respect to employment, a disabled person who, with reasonable accommodation, can perform the essential functions of the job in question, but the term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such person from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others; and

(2) with respect to other programs or activities, a disabled person who meets the essential eligibility requirements of such programs or activities.

98252. Integrated Setting.

It is a discriminatory practice for a recipient of State support to fail to administer programs and activities in the most integrated setting appropriate to the needs of qualified disabled persons.

98253. Communications.

It is a discriminatory practice where a recipient of State support fails to take appropriate steps to ensure that communications with their applicants and beneficiaries are available to persons with impaired vision or hearing.

98254. Program Accessibility.

(a) Except as set forth in subsection (b) below, it is a discriminatory practice where a qualified disabled person, because a recipient's facilities are inaccessible to or unusable by such person, is denied the benefits of, or excluded from participation in, or otherwise subjected to discrimination under any program or activity to which this Division applies. It is a discriminatory practice for a recipient to fail to operate each program or activity to which this Division applies in such a manner that the program or activity, when viewed in its entirety, is readily accessible to disabled persons. This section does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by disabled persons.

(b) It is a discriminatory practice for recipients operating fixed route bus systems or paratransit systems to fail to adhere to the program accessibility requirements set forth in Title 49, Part 27 of the Code of Federal regulations.

98255. Methods of Ensuring Program Accessibility.

A recipient may comply with the provisions of Section 98254 through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignments of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities, or other methods that result in making its program or activities accessible to disabled persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with Section 98254. In choosing among available methods for meeting the provisions of Section 98254, it is a discriminatory practice for a recipient to fail to give priority to those methods that offer programs and activities to disabled persons in the most integrated setting appropriate.

98256. Methods For Small Recipients.

If a recipient with fewer than fifteen employees finds, after consultation with a disabled person seeking its services, that there is no method of complying with Section 98254 other than by making a significant alteration to its existing facilities, the recipient may, as an alternative, be permitted by the responsible State agency to refer the disabled person to other providers whose services are accessible.

98257. Time Period for Compliance.

It is discriminatory practice for a recipient to fail to comply with the requirement of Section 98254 within sixty days of the effective date of implementing regulations, except that where structural changes in facilities are necessary, such changes may be made within three years of such effective date, but in any event, as expeditiously as possible.

98258. Transition Plan.

In the event that structural changes to facilities are necessary to meet the provisions of Section 98254, a recipient should be required by the responsible State agency to develop, within six months of the effective date of implementing regulations, a transition plan setting forth the steps necessary to complete such changes. The plan should be developed with the assistance of interested persons, including disabled persons or organizations representing disabled persons. A copy of the transition plan should be made available for public inspection. The plan should, at a minimum:

(a) identify physical obstacles in the recipient's facilities that limit the accessibility of this program or activity to disabled persons;

(b) describe in detail the methods that will be used to make the facilities accessible;

(c) specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(d) indicate the person responsible for implementation of the plan.

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